Jurisdictional Statement

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81-583

No. —

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BENEFICIAL FINANCE OF KANSAS, INC., *Cross-Appellant*

v.

UNITED STATES OF AMERICA, ET AL., *Cross-Appellees*

Cross-Appeal from the United States Court of Appeals for the Tenth Circuit

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JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether, pursuant to the Bankruptcy Reform Act of 1978, Congress may lawfully vest the power to adjudicate all matters under Title 11 of the United States Code, as enacted by the Act, in Bankruptcy Judges whose appointment, tenure and compensation do not comply with but are in conflict with Article III of the Constitution; and consequently whether such Bankruptcy Judges may exercise the powers vested in them by the Bankruptcy Reform Act of 1978.

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v.

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Cross-Appeal from the United States Court of Appeals for the Tenth Circuit

JURISDICTIONAL STATEMENT

Beneficial Finance of Kansas, Inc. ("Beneficial") cross-appeals from the Judgment of the United States Court of Appeals for the Tenth Circuit affirming the bankruptcy court's dismissals of the debtors' "Applications to Avoid Lien", on the ground that instead of affirming, the Court of Appeals should have vacated and dismissed the entire bankruptcy proceeding because the Bankruptcy Reform Act of 1978 (Pub.L. 95-598), and the purported exercise of jurisdiction pursuant thereto by the so-called Bankruptcy Judge, conflict with Article III, Section 1 of the United States Constitution. Cross-appellant agrees with and does not contest the Court of Appeals' decision that Section

522(f)(2) of the Bankruptcy Reform Act (11 U.S.C. § 522(f)(2)), as applied in these cases to invalidate liens existing before enactment of the Reform Act, violates the Fifth Amendment.

Although the question presented by this cross-appeal was not raised below, it should now be considered by this Court because it involves a fundamental, jurisdictional defect in this proceeding—whether the bankruptcy court itself as constituted and empowered under the Bankruptcy Reform Act represents a legislative encroachment on the constitutional grant of judicial power under Article III. Indeed, the question is so fundamental that if not raised by the parties, this Court should consider it on its own motion.

An appeal raising a related aspect of this issue has been docketed in this Court in *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, No. 81-150. In that case, the United States District Court for the District of Minnesota held that the bankruptcy court, as constituted under the Reform Act, lacked jurisdiction to adjudicate adversary proceedings relating to contract claims not involving possession or consent. It characterized the provision of the Bankruptcy Reform Act which confers such jurisdiction upon the Bankruptcy Court as "amazingly broad"—and held that it "is an unconstitutional delegation of Article III power to nontenured judges." *Marathon Pipeline Co.* v. *Northern Pipeline Construction Co.*, [1981] CCH Bank. L. Rptr. ¶ 68,268 at 79,491 (D. Minn.)—a vast enlargement of the traditional jurisdiction of the bankruptcy courts.

In order to facilitate this Court's management of these appeals, simultaneously herewith Beneficial has

filed a Motion to Consolidate or Coordinate this cross-appeal with the appeal in No. 81-150.

Further, to ensure that no procedural obstacle prevents this Court from consideration of the issue presented, Beneficial has also filed a Motion to Enlarge the Question Presented in *United States of America* v. *Security Industrial Bank*, No. 81-184 (which includes the present cases), so as to embrace the question defined by this cross-appeal.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 642 F.2d 1193 and appears as Appendix A to the Government's Jurisdictional Statement (p. 1a).

The Memorandum of Decision of the Bankruptcy Judge (Referee) in the present cases appears as Appendix F to the Government's Jurisdictional Statement (p. 52a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1981; notice of appeal was filed by the United States on April 1, 1981, and after proper extension of time, the United States docketed its appeal from the judgment of the Tenth Circuit in this Court under 28 U.S.C. § 1252 on July 29, 1981 (No. 81-184). The jurisdictional statement in No. 81-184 was served upon Beneficial on August 19, 1981. This cross-appeal is timely filed pursuant to Rule 12.4 of this Court.

Federal jurisdiction in the Bankruptcy Court was invoked under 8 U.S.C. (Supp. III) § 1471 and Titles II and IV of the Bankruptcy Reform Act of 1978,

Pub.L. 95-598, 92 Stat. 2657-2673, 2682-2688. This cross-appeal contends that the Bankruptcy Court in which these provisions purport to vest power violate Article III, Section 1 of the Constitution and, therefore, the Bankruptcy Court is and was without authority to entertain the proceedings below.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Article I, Section 8, Clause 4 of the United States Constitution provides:

> The Congress shall have Power . . .
>
> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

2. Article III, Section 1 of the United States Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

3. Article III, Section 2, Clause 1 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public

Ministers and Consuls; —to all cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between citizens of the same State claiming Lands under Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens or Subjects.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Bankruptcy Reform Act of 1978, Pub.L. 95-598, Title II, §§ 201-252, and Title IV, §§ 401-411, 92 Stat. 2657-2673, 2682-2688, are reproduced in the Appendix hereto.

In relevant part, the Bankruptcy Reform Act of 1978 effected the following changes: Bankruptcy referees appointed prior to the effective date of the Act are to exercise all powers which Congress has vested in the Bankruptcy Courts during the "transition period," i.e., from October 1, 1979, the effective date of the Act, until their successors—who are also non-Article III judicial officers (see *infra*)—take office on or after March 31, 1984 (Title IV § 404(f)). The referees, whom the Reform Act characterizes as "Bankruptcy Judges,"[1] were appointed by the respective District Courts for a term of six years; their remuneration is subject to review, including diminution under the Federal Salary Act (Reform Act, Title IV § 404(f)); and they are removable by the District Courts "for incompetency, misconduct, or neglect of duty." Former 11 U.S.C. § 62. After the "transition period,"

[1] Under the 1973 Bankruptcy Rules, the referees were styled "Bankruptcy Judges" for certain purposes.

Bankruptcy Judges are to be appointed by the President, with the advice and consent of the Senate (28 U.S.C. § 152) for a term of 14 years (28 U.S.C. § 153(a)); otherwise, the relevant provisions are the same as in the case of the interim "judges"; their salaries will be subject to review, including diminution under the Federal Salary Act; and, they will also be subject to removal (by the judicial councils of their respective circuits) for "incompetency, misconduct, neglect of duty or physical or mental disability." 28 U.S.C. § 153(b).

Prior to enactment of the Bankruptcy Reform Act of 1978, jurisdiction over bankruptcies was vested in the United States District Courts, i.e., in Article III federal judges, and the jurisdiction of the bankruptcy courts was confined to matters stemming from possession or custody of the bankrupt's property, or adjudicated on consent of the parties. See *Marathon, supra,* at 79,492. Within these jurisdictional limits, referees were invested with defined powers "subject always to review" by an Article III District Judge (former 11 U.S.C. § 66). The District Judge could, at any time, "for the convenience of parties or other cause," withdraw a case in whole or in part from a referee and either act himself or assign the case, or part thereof, to another referee in the district. (Bankruptcy Rule 102(b)). Appeals from rulings of the referee could be filed with the District Court (former 11 U.S.C. § 67) and under Rule 810 of the Rules of Bankruptcy, the District Court could "affirm, modify or reverse a referee's judgment or order, or remand with instructions for further proceedings."

Pursuant to the Bankruptcy Reform Act of 1978, original and exclusive jurisdiction of all cases under Title 11, although nominally conferred upon the Dis-

trict Court, shall be exercised by the bankruptcy courts (28 U.S.C. §§ 1471(a) and (c)), which are no longer the district courts but are "an adjunct to", although now totally independent of, the district courts. 28 U.S.C. § 151(a).

At present, during the so-called "transition period," the existing referees in bankruptcy are fully empowered to act as bankruptcy judges and hear and decide all matters within the bankruptcy court's jurisdiction. Reform Act, Title IV § 404. Each referee was appointed by a district judge for a six-year term. Former 11 U.S.C. §§ 61, 62. His compensation is keyed to the Federal Salary Act, which allows for diminution. 28 U.S.C. §§ 152, 153; Reform Act, Title IV 404(f). Rather than the impeachment process afforded judicial officers by the Constitution, they serve subject to abrupt removal by the District Court for "incompetency, misconduct, or neglect of duty". Former 11 U.S.C. § 62(b).

Beginning in 1984, the bankruptcy judges will be appointed by the President, with advice and consent of the Senate, for 14-year terms. 28 U.S.C. §§ 152, 153. They will be subject to removal by the judicial councils of the circuits for incompentency, misconduct, neglect of duty or physical or mental disability; and, their compensation will be subject to review, including diminution, under the Federal Salary Act. 28 U.S.C. § 153(b).[2]

Under the Bankruptcy Reform Act the non-Article III judges of the bankruptcy court are expressly given

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[2] In addition, the bankruptcy judges will not be limited to sitting in the bankruptcy courts: 28 U.S.C. § 294, as amended effective in 1984, will allow retired bankruptcy judges to be assigned to sit in any district or circuit court.

"the powers of a court of equity, law and admiralty" (28 U.S.C. § 1481); they are explicitly given the power to issue a writ of habeas corpus (28 U.S.C. § 2256), hold jury trials (28 U.S.C. § 1480), and, issue any order, process or judgment that is necessary or appropriate to carry out the provisions of Title 11. (11 U.S.C. § 105(a)). In some respects the bankruptcy courts, acting through non-Article III judges, are given jurisdiction even greater than the powers given to District Courts in the exercise of their general jurisdiction. Thus, they may remove any action "arising in or related to a case under Title 11" from any state or federal court, and the removal decision is not reviewable "by appeal or otherwise." 28 U.S.C. § 1478.

Under the Bankruptcy Reform Act of 1978 parties cannot have their disputes, of whatever nature, tried by an Article III judge. Moreover, the new statutory scheme contemplates that Article III judges will be deprived of even review jurisdiction over the decisions of the non-tenured judges: the Reform Act provides authority to create appellate panels of non-tenured bankruptcy judges to hear initial appeals from the non-tenured lower court. 28 U.S.C. §§ 160, 1482.

STATEMENT OF THE CASE

The debtors herein initiated this proceeding to adjudicate themselves bankrupt by filing petitions seeking relief under the provisions of the Bankruptcy Reform Act of 1978 (11 U.S.C. §§ 101, *et seq.;* (the "Code")), in the United States Bankruptcy Court for the District of Kansas. The petitions named cross-appellant Beneficial Finance of Kansas, Inc. as a secured creditor and Beneficial was notified of the pendency of the proceedings. Thereafter, each debtor filed an "Application to

Avoid Lien" in the bankruptcy court seeking, pursuant to Section 522(f) of the Bankruptcy Reform Act, to extinguish Beneficial's secured interests in property, which attached prior to enactment of the Reform Act. The Applications to Avoid Liens were contested on the grounds that Section 522(f) was unconstitutional in that it violated the Fifth Amendment. The United States intervened pursuant to 28 U.S.C. § 2403.

The United States "Bankruptcy Judge" (the referee) serving in that district assumed jurisdiction over these controversies and consolidated the two cases. He held that, to avoid an unconstitutional result, Section 522(f) should be construed to be inapplicable to Beneficial's liens which preexisted the enactment of the Bankruptcy Reform Act, and dismissed the Applications to Avoid Liens.[3] The debtors and the United States appealed to the Tenth Circuit Court of Appeals pursuant to the Bankruptcy Reform Act (28 U.S.C. § 1293(b)). That court consolidated the two Kansas appeals, in which Beneficial is a party, with three appeals from the United States Bankruptcy Court for the District of Colorado in which bankruptcy judges held that retroactive application of the lien avoidance provision of the Reform Act was unconstitutional. After hearing upon an expedited basis due to the importance of the question, the Tenth Circuit entered judgment affirming the orders entered by the bankruptcy courts. It based its decision, however, on the grounds relied upon by the Colorado bankruptcy judges, namely that the statute was intended to apply retroactively and was unconstitutional.

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[3] At no time did an Article III District Judge have or exercise any jurisdiction over the applications or any of the bankruptcy proceedings.

The United States has appealed the judgment of the Tenth Circuit to this Court pursuant to 28 U.S.C. § 1252 (No. 81-184). Beneficial cross-appeals pursuant to Rule 12.4 to raise the constitutional and jurisdictional question of whether the Court of Appeals, instead of affirming the judgments of the bankruptcy courts, should have vacated those judgments and dismissed the proceedings before the bankruptcy courts on the grounds that the bankruptcy judges could not lawfully act in the bankruptcy proceedings or adjudicate the controversies before them because their appointment, tenure and compensation do not comply with, but conflict with Article III, Section 1 of the Constitution. This cross-appeal is filed to seek modification of the judgment and order of the Tenth Circuit Court of Appeals to include vacating the judgment of the bankruptcy courts with instructions to dismiss the entire proceedings. See, *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 590 n. 11, 96 S.Ct. 2295, 2302 n. 11 (1976); *Mills* v. *Electric Auto-Lite Company*, 396 U.S. 376, 381, 90 S.Ct. 616, 620 (1970).

THE QUESTION IS SUBSTANTIAL

1. The jurisdictional question presented here may be raised for the first time in this cross-appeal despite the fact that it was not raised below. *Glidden Company* v. *Zdanok*, 370 U.S. 530, 536-7, 82 S.Ct. 1459, 1465-66 (1962); *Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 209, 83 S.Ct. 1185, 1188 (1963); *McGrath* v. *Kristensen*, 340 U.S. 162, 167, 71 S.Ct. 224, 228 (1950) (Article III Jurisdiction involved). In *Glidden*, for example, the question of whether Article III was violated by designating judges of the Court of Claims and Court of Customs and Patent Appeals to sit on the dis-

trict court and court of appeals was raised for the first time in the petition for certiorari. This Court said (370 U.S. at 536-7, 82 S.Ct. at 1465-66):

> "The alleged defect of authority here relates to basic constitutional protections designed in part for the benefit of litigants. See O'Donoghue v. United States, 289 U.S. 516, 532-534, 53 S.Ct. 740, 743, 744, 77 L.Ed. 1356 *It should be examinable at least on direct review,* where its consideration encounters none of the objections associated with the principle of res judicata, that there be an end to litigation. At the most is weighed in opposition the disruption to sound appellate process entailed by entertaining objections not raised below, *and that is plainly insufficient to overcome the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers.* So this Court has concluded on an analagous balance struck to protect against intruding federal jurisdiction into the area constitutionally reserved to the States: Whether diversity of citizenship exists may be questioned on direct review for the first time in this Court. [Citations omitted] We hold that it is similarly open to these petitioners to challenge the constitutional authority of the judges below." (Emphasis added).

Alternatively, this Court should and must consider the jurisdictional and constitutional question raised by these cases on its own motion. This Court has repeatedly held that where the record discloses jurisdictional defects in lower court proceedings, even if those defects are not raised by a party, this Court will recognize those defects and correct them. *Cf., United States* v. *Corrick,* 298 U.S. 435, 440, 56 S.Ct. 829, 831 (1936); *King Iron Bridge & Manufacturing Co.* v. *County of Oloe,* 120 U.S. 225, 226, 7 S.Ct. 552, 553 (1887).

2. The jurisdictional and constitutional question presented by this cross-appeal is clearly substantial. The Bankruptcy Reform Act became effective on October 1, 1979. In the year ending June 30, 1980, for example, more than 500,000 bankruptcy proceedings were filed involving millions of creditors. (Administrative Office of U.S. Courts). The question which the present cases present accordingly affects hundreds of thousands of proceedings.

Pursuant to the Bankruptcy Reform Act, Congress established new bankruptcy courts, the judges of which lack the tenure and salary protections that Article III of the United States Constitution requires for all judges exercising "the Judicial Power of the United States." These judges are nonetheless empowered to hear and determine a wide variety of cases which can only be adjudicated by courts exercising the Judicial Power of the United States; the grant of jurisdiction even "in some instances exceeds the jurisdiction of the federal courts." *Marathon, supra,* at 79,492 citing *Collier on Bankruptcy,* Appendix 1, ¶ 3.01 [1] [d] [ii] (1980). In hearing and deciding such cases, these bankruptcy courts have plenary power: the Reform Act provides that "a bankruptcy court shall have the powers of a court of equity, law, and admiralty. . . ." 28 U.S.C. § 1481.[4] Freed from their historical moorings to the district court, "[t]he bankruptcy court[s] may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the

[4] Two minor exceptions are provided: a bankruptcy court may not enjoin another court or punish a criminal contempt not committed in the judge's presence or warranting a punishment of imprisonment. 28 U.S.C. § 1481.

Bankruptcy Reform Act. 11 U.S.C. § 105. Where required, juries may be empanelled; writs of habeas corpus may be issued; contempt judgments entered; and in general, the jealously guarded right of citizens in our federal system to trial by an Article III judge is ruthlessly shattered. In short, Congress created a full scale court, which wholly preempts the jurisdiction of the federal district courts with respect to bankruptcy and, indeed, any case which may be related to a bankruptcy proceeding.

Article III, Section 1 of the United States Constitution requires that whenever "the Judicial Power of the United States" is exercised, it must be exercised by judges who "hold their Offices during good Behaviour" and who shall receive periodic compensation "which shall not be diminished during their Continuance in Office." Article III, Section 2, states categorically that "the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made. . . ." Since the bankruptcy laws are clearly "Laws of the United States," *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 610, 652 n. 3, 69 S.Ct. 1173, 1187, 1198 n. 3 (1949), judges deciding bankruptcy matters must be afforded the independence in job tenure and salary protection established by Article III.

The new "courts of bankruptcy" cannot be squared with the explicit provisions of Article III. One lower court, in a case involving an attempted exercise of "extended jurisdiction" authorized by the Bankruptcy Reform Act, has already held that 28 U.S.C. § 1471, the section of the Bankruptcy Reform Act which sets

forth the jurisdiction of the bankruptcy courts, "is an unconstitutional delegation of Article III power to nontenured judges." *Marathon Pipeline Co.* v. *Northern Pipeline Construction Co.*, [1981] (CCH Bankr. L. Reptr. § 68,268 (appeal docketed in this Court July 17, 1981, No. 81-150).[8]

3. This Court will at some point inevitably be confronted with the question raised by the cross-appeal. Early resolution of this question is critical to the administration of the bankruptcy laws throughout the country. Beneficial has simultaneously herewith filed a motion to consolidate or coordinate this appeal with the appeal in *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, No. 81-150.

4. Congress was aware of the Article III problem when it passed the Code. The House Subcommittee responsible for reporting out the bill, after consultation with numerous constitutional scholars, saw clearly the need to conform the new courts to Article III:

> "In sum, the Constitution suggests that an independent Bankruptcy Court must be created under Article III. Article III is the constitutional norm, and the limited circumstances in which the courts have permitted departure from the requirements of Article III are not present in the bankruptcy context. Even if they were present, the text of the Constitution and the case law indicate that a court created without regard to Article III must likely could not exercise the power needed by a Bankruptcy Court to carry out its proper functions. In view of Congress' independent obligation, and the Congressional oath, to support the Constitution,

[8] The basic constitutional question has been raised in at least one other court. See, e.g., *In re Ulysses Rivers, Jr.* (No. 81-0682) (Bankr. Ct. E.D. Tenn. 1981).

> the decision on this issue should not simply be thrown to the courts. Congress should establish the proposed Bankruptcy Court under Article III, with all of the protection that the Framers intended for an independent judiciary." Report of the House Subcommittee on Civil and Constitutional Rights for the Committee of the Judiciary, H.R. Rep. No. 95-595, 95th Cong. 1st Sess., at 39, *reprinted in* [1978] U.S. Code Cong. & Ad. News 5968 at 6000.

The Senate Report sought to justify the new bankruptcy courts by reference to the provision in Article I, Section 8, which, in enumerating the various Congressional powers, provides that "the Congress shall have Power . . . To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States." While Article I, Section 8 gives Congress broad power to enact bankruptcy laws, Congress may not use that power to deprive citizens of the rights guaranteed to them by the remainder of the Constitution. Thus, this Court has held that Congress may not utilize its power to enact uniform bankruptcy laws so as to deprive a citizen of his Fifth Amendment protection against the taking of property without just compensation or his Fifth Amendment right to due process. *Louisville Joint Stock Land Bank* v. *Radford,* 295 U.S. 555, 55 S.Ct. 853 (1935). Cross-appellants submit that Congress similarly may not use its power to enact bankruptcy statutes to deprive a party to a federal court proceeding of his right to be heard by an independent judge who enjoys the protections prescribed by Article III, Section 1.

To hold to the contrary would fly in the face of decisions, going back to the early days of the Republic, which hold that cases within Article III's grants of jurisdiction may only be decided by Article III courts. For example, in *American Insurance Company* v. *356 Bales of Cotton (Canter)*, 26 U.S. (1 Pet.) 511, 7 L.Ed. 242, 257 (1828), Chief Justice Marshall for the Court held that "admiralty jurisdiction can be exercised in the states in those courts *only* which are established in pursuance of the 3rd article of the Constitution. . . ." (Emphasis added). The Bankruptcy Reform Act, however, explicitly authorizes non-Article III bankruptcy judges to sit as a court of admiralty. 28 U.S.C. § 1481.

5. The question of whether Congress may properly create new bankruptcy courts which do not comply but conflict with Article III is thus both substantial and inevitably affects the perceived quality of justice.

Practically, the issue presented by these cases is whether the many thousands of debtors, creditors, and "related" litigants who appear in bankruptcy court each year are entitled to an impartial, life-tenured judiciary or whether they can be compelled to litigate before judges beholden to Congress and the Executive Branch for their continuation in office, pay, and their benefits.

Alexander Hamilton perhaps best explained the problem, and the purpose of Article III, in *The Federalist*, No. 78:

> "The standard of good behavior, for the continuance in office of the Judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy, it is an excellent barrier to the despotism of the prince: In a republic, it is a no less

excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws. (No. 78, at 2).

"That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from Judges who hold their offices by a temporary commission. Periodic appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or Legislature, there would be danger of an improper complaisance to the branch which possessed it: if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws." (No. 78 at 14).

And this Court has recently stated:

"The Compensation Clause has its roots in the long-standing Anglo-American tradition of an independent judiciary. A judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *United States* v. *Will*, —— U.S. ——, 101 S.Ct. 471, 482 (1980). (Congress may not repeal already effective salary increases).

The new bankruptcy courts do not meet this test.

CONCLUSION

Probable jurisdiction should be noted on this cross-appeal.

Respectfully submitted,

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Appendix

APPENDIX

Bankruptcy Reform Act of 1978, Pub. L. 95-598
Title II

Sec. 201. (a) Title 28 of the United States Code is amended by inserting immediately after chapter 5 the following:

"Sec.
"151. Creation and composition of bankruptcy courts.
"152. Appointment of bankruptcy judges.
"153. Tenure and residence of bankruptcy judges.
"154. Salaries of bankruptcy judges.
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"159. Vacant judgeship as affecting proceedings.
"160. Appellate panels.

"§ 151. Creation and composition of bankruptcy courts

"(a) There shall be in each judicial district, as an adjunct to the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district.

"(b) Each bankruptcy court shall consist of the bankruptcy judge or judges for the district in regular active service. Justices or judges designated and assigned shall be competent to sit as judges of the bankruptcy court.

"(c) Except as otherwise provided by law, or rule or order of court, the judicial power of a bankruptcy court with respect to any action, suit or proceeding may be exercised by a single bankruptcy judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other bankruptcy judges.

"§ 152. Appointment of bankruptcy judges

"The President shall appoint, by and with the advice and consent of the Senate, bankruptcy judges for the several judicial districts. In each instance, the President shall give due consideration to the recommended nominee or nominees of the Judicial Council of the Circuit within which an appointment is to be made.

"§ 153. Tenure and residence of bankruptcy judges

"(a) Each bankruptcy judge shall hold office for a term of 14 years, but may continue to perform the duties of his office until his successor takes office, unless such office has been eliminated.

"(b) Removal of a bankruptcy judge during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability. Removal shall be by the judicial council of the circuit or circuits in which the bankruptcy judge serves, but removal may not occur unless a majority of all the judges of such circuit council or councils concur in the order of removal. Before any order of removal may be entered, a full specification of the charges shall be furnished to the bankruptcy judge, and he shall be accorded an opportunity to be heard on the charges. Any cause for removal of any bankruptcy judge coming to the knowledge of the Director of the Administrative Office of the United States Courts shall be reported by him to the chief judge of the circuit or circuits in which he serves, and a copy of the report shall at the same time be transmitted to the circuit council or councils and to the bankruptcy judge.

"(c) Each bankruptcy judge shall reside in the district or one of the districts for which he is appointed, or within 20 miles of his official station.

"(d) If the public interest and the nature of the business of a bankruptcy court require that a bankruptcy judge

should maintain his abode at or near a particular part of the district the judicial council of the circuit may so declare and may make an appropriate order. If the bankruptcy judges of such a district are unable to agree as to which of them shall maintain his abode at or near the place or within the area specified in such an order the judicial council of the circuit may decide which of them shall do so.

"§ 154. Salaries of bankruptcy judges

"Each judge of a bankruptcy court shall receive a salary at an annual rate of $50,000, subject to adjustment under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), and section 461 of this title.

"§ 160. Appellate panels

"(a) If the circuit council of a circuit orders application of this section to a district within such circuit, the chief judge of each circuit shall designate panels of three bankruptcy judges to hear appeals from judgments, orders, and decrees of the bankruptcy court of the United States for such district. Except as provided in section 293(e) of this title, a panel shall be composed only of bankruptcy judges for districts located in the circuit in which the appeal arises. The chief judge shall designate a sufficient number of such panels so that appeals may be heard and disposed of expeditiously.

"(b) A panel designated under subsection (a) of this section may not hear an appeal from a judgment, order, or decree entered by a member of the panel.

"(c) When hearing an appeal, a panel designated under subsection (a) of this section shall sit at a place convenient to the parties to the appeal.".

Sec. 206. Section 294 of title 28 of the United States Code is amended—

(1) in subsection (c), by deleting "or district" and inserting "district or bankruptcy judge"; and

(2) in subsection (d), by striking out "or district judge" and inserting in lieu thereof ", district judge or bankruptcy judge".

Sec. 207. Section 295 of title 28 of the United States Code is amended by striking out "or district" and inserting in lieu thereof "district, or bankruptcy".

Sec. 213. Section 451 of title 28 of the United States Code is amended—

(1) by inserting a comma and "and bankruptcy courts, the judges of which are entitled to hold office for a term of 14 years" immediately before the period at the end of the paragraph beginning with "The term 'court of the United States' "; and

(2) by inserting a comma and "and judge of the bankruptcy courts, the judges of which are entitled to hold office for a term of 14 years" immediately before the period at the end of the paragraph beginning with "The term 'judge of the United States' ".

Sec. 236. (a) Chapter 83 of title 28 of the United States Code is amended by inserting immediately after section 1292 the following:

"§ 1293. Bankruptcy appeals

"(a) The courts of appeals shall have jurisdiction of appeals from all final decisions of panels designated under section 160(a) of this title.

"(b) Notwithstanding section 1482 of this title, a court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of an appellate panel created under section 160 or a District Court of the United States or from a final judgment, order, or decree of a bankruptcy

court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals.".

(b) The table of sections of chapter 83 of title 28 of the United States Code is amended by inserting immediately after the item relating to section 1292 the following:

"1293. Bankruptcy appeals.".

Sec. 237. Section 1294 of title 28 of the United States Code is amended—

(1) by striking out "district and territorial" and inserting in lieu thereof "district, bankruptcy, and territorial";

(2) by striking out the period at the end thereof and inserting a semicolon; and

(3) by adding at the end thereof the following:

"(5) From a panel designated under section 160(a) of this title to the court of appeals for the circuit in which the panel was so designated;

"(6) From a bankruptcy court of the United States to the court of appeals for the circuit embracing the district in which the bankruptcy court is located.".

Sec. 238. (a) Section 1334 of title 28 of the United States Code is amended to read as follows:

"§ 1334. Bankruptcy appeals

"(a) The district courts for districts for which panels have not been ordered appointed under section 160 of this title shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts.

"(b) The district courts for such districts shall have jurisdiction of appeals from interlocutory orders and decrees of bankruptcy courts, but only by leave of the district court to which the appeal is taken.

"(c) A district court may not refer an appeal under that section to a magistrate or to a special master.".

(b)The table of sections of chapter 85 of title 28 of the United States Code is amended by striking out the item relating to section 1334 and inserting in lieu thereof the following:

Sec. 241. (a) Title 28 of the United States Code is amended by inserting immediately after chapter 89 the following:

"CHAPTER 90—DISTRICT COURTS AND BANKRUPTCY COURTS

"Sec.
"1471. Jurisdiction.
"1472. Venue of cases under title 11.
"1473. Venue of proceedings arising under or related to cases under title 11.
"1474. Venue of cases ancillary to foreign proceedings.
"1475. Change of venue.
"1476. Creation or alteration of district or divsion.
"1477. Cure or waiver of defects.
"1478. Removal to the bankruptcy courts.
"1479. Provisional remedies; security.
"1480. Jury trials.
"1481. Powers of bankruptcy court.
"1482. Appeals.

• • • • • • • • • • •

"§ 1471. Jurisdiction

"(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

"(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but

not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

"(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

"(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

"(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

"§ 1478. Removal to the bankruptcy courts

"(a) A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by a Government unit to enforce such governmental unit's police or regulatory power, to the bankruptcy court for the district where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action.

"(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise.

"§ 1479. Provisional remedies; security

"(a) Whenever any action is removed to a bankruptcy court under section 1478 of this title, any attachment or sequestration of the goods or estate of the defendant in such action shall hold the goods or estate to answer the

final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the court from which the action was removed, unless the attachment or sequestration is invalidated under applicable law.

"(b) Any bond, undertaking, or security given by either party in an action prior to removal under section 1478 of this title shall remain valid and effectual notwithstanding such removal, unless such bond, undertaking, or other security is invalidated under applicable law.

"(c) All injunctions, orders, or other proceedings, in an action prior to removal of such action under section 1478 of this title shall remain in full force and effect until dissolved or modified by the bankruptcy court.

"§ 1480. Jury trials

"(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979.

"(b) The bankruptcy court may order the issues arising under section 303 of title 11 to be tried without a jury.

"§ 1481. Powers of bankruptcy court

"A bankruptcy court shall have the powers of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment.

"§ 1482. Appeals

"(a) Panels designated under section 160(a) of this title shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts.

"(b) Panels designated under section 160(a) of this title shall have jurisdiction of appeals from interlocutory judgments, orders, and decrees of bankruptcy courts, but only by leave of the panel to which the appeal is taken.".

Sec. 250. (a) Chapter 153 of title 28 of the United States Code is amended by adding at the end thereof the following:

"§ 2256. Habeas corpus from bankruptcy courts

"A bankruptcy court may issue a writ of habeas corpus—

"(1) when appropriate to bring a person before the court—

"(A) for examination;

"(B) to testify; or

"(C) to perform a duty imposed on such person under this title; or

"(2) ordering the release of a debtor in a case under title 11 in custody under the judgment of a Federal or State court if—

"(A) such debtor was arrested or imprisoned on process in any civil action;

"(B) such process was issued for the collection of a debt—

"(i) dischargeable under title 11; or

"(ii) that is or will be provided for in a plan under chapter 11 or 13 of title 11; and

"(C) before the issuance of such writ, notice and a hearing have been afforded the adverse party of such debtor in custody to contest the issuance of such writ".

Title IV

Transition

Sec. 404. (a) The courts of bankruptcy, as defined under section 1(10) of the Bankruptcy Act, created under

section 2a of the Bankruptcy Act, and existing on September 30, 1979, shall continue through March 31, 1984, to be the courts of bankruptcy for the purposes of this Act and the amendments made by this Act. Each of the courts of bankruptcy so continued shall constitute a separate department of the district court that is such court of bankruptcy under the Bankruptcy Act.

(b) The term of a referee in bankruptcy who is serving on the date of enactment of this Act is extended to and expires on March 31, 1984 or when his successor takes office. During the period commencing on October 1, 1979, and ending on March 31, 1984 (hereinafter in this title referred to as "the transition period"), unless such referee is found to be not qualified by the Chief Judge of the Circuit Court after consultation with a merit screening committee established as provided in subsection (c) of this section, such a referee in bankruptcy upon the expiration of his appointed term as referee shall have the title of United States bankruptcy judge, and shall serve in the court of bankruptcy continued under subsection (a) of this section that appointed such United States bankruptcy judge, in the manner prescribed by this title. Section 8335(a) of title 5 of the United States Code shall not apply in respect of United States bankruptcy judges during the transition period.

(f) During the transition period, the provisions of sections 455, 456, 569(a), 571(b), 620(b)(3), and 957(a) of title 28 of the United States Code shall apply to United States bankruptcy judges and to any court officers or employees appointed or employed under subsection (e) of this section the same as such sections apply to the bankruptcy judges, and to any court officers or employees, of a United States bankruptcy court established under section 201 of this Act. During the transition period, the position of United States bankruptcy judge shall be deemed to be a position within the purview of subparagraph (C) of section 225(f) of the Federal Salary Act of 1967 (2 U.S.C. 356(C)).

• • • • • • • • • •

Sec. 405. (a)(1) All cases commenced under title 11 of the United States Code during the transition period shall be referred to the United States bankruptcy judges. The United States bankruptcy judges may exercise in such cases the jurisdiction and powers conferred by subsection (b) of this section on the courts of bankruptcy continued by section 404(a) of this Act, and all proceedings in such cases shall be before the United States bankruptcy judges, except—

(A) a proceeding to enjoin a court;

(B) a proceeding to punish a criminal contempt—

(i) not committed in the bankruptcy judge's actual presence; or

(ii) warranting a punishment of imprisonment; or

(C) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge.

(2) Except as provided in subsection (c) of this section, any proceeding in a court of bankruptcy in a case under title 11 of the United States Code that is not before the United States bankruptcy judge shall be before the judge of the court of bankruptcy for the district in which such case is pending.

(b) During the transition period, the amendments made by sections 241, 243, 250, and 252 of this Act shall apply to the courts of bankruptcy continued by section 404(a) of this Act the same as such amendments apply to the United States bankruptcy court established under section 201 of this Act.

(c)(1) During the transition period, an appeal from a judgment, order, or decree of a United States bankruptcy judge shall be—

(A) if the circuit council of the circuit in which the bankruptcy judge sits so orders for the district in which the bankruptcy judge sits, then to a panel of three bankruptcy judges appointed in the manner prescribed by section 160 of title 28 of the United States Code, as added by section 201 of this Act;

(B) if the parties to the appeal agree to a direct appeal to the court of appeals for such circuit, then to such court of appeals; or

(C) to the district court for the district in which the bankruptcy judge sits.

(2) During the transition period, the jurisdiction of the district courts, the courts of appeals, and panels of bankruptcy judges to hear appeals shall be the same as the jurisdiction of such courts and panels granted under the amendments made by sections 236, 237, 238, and 241 of this Act to hear appeals from the judgments, orders, and decrees of the bankruptcy courts established under section 201 of this Act.

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
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CLERK

No. 81-583

In the Supreme Court of the United States

OCTOBER TERM, 1981

BENEFICIAL FINANCE OF KANSAS, INC., CROSS-APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON CROSS-APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION TO DISMISS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

Whether the exercise of summary bankruptcy jurisdiction by a bankruptcy court under the transition provisions of the Bankruptcy Reform Act of 1978 violates Article III of the Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-583

BENEFICIAL FINANCE OF KANSAS, INC., CROSS-APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON CROSS-APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION TO DISMISS

The Solicitor General, on behalf of the United States, moves pursuant to Rule 16.1 of the Rules of this Court that this cross-appeal be dismissed for lack of jurisdiction.

OPINIONS BELOW

The opinion of the court of appeals (No. 81-184 J.S. App. 1a-12a) is reported at 642 F. 2d 1193. The opinion of the bankruptcy court (No. 81-184 J.S. App. 52a-59a) is reported at 8 Bankr. Rep. 12.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1981. The government filed its notice of appeal on April 1, 1981. The appeal was docketed as No. 81-184 on July 29, 1981, and the jurisdictional statement was received by cross-appellant on August 19, 1981. This cross-appeal was filed on September 18, 1981. See Sup. Ct. R. 12.4. As explained below, there is no basis for jurisdiction of this cross-appeal.

STATUTE INVOLVED

28 U.S.C. 1252 provides:

> Direct appeals from decisions invalidating Acts of Congress
>
> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.
>
> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

STATEMENT

1. In 1978, Congress enacted a comprehensive revision of the federal bankruptcy laws. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. One of the central features of the Bankruptcy Reform Act was a change in the structure and jurisdiction of the bankruptcy courts. Prior to 1978, federal district courts served as bankruptcy courts (see 11 U.S.C. 1(10)), though all proceedings in bankruptcy cases generally were held before bankruptcy referees unless the district court elected to withdraw the case from the referee. See Bankruptcy Rule 102. The judgment of the referee was final unless appealed to the district court within ten days. Bankruptcy Rules 801-803. The jurisdiction of the bankruptcy courts was defined in 11 U.S.C. 11. They were invested with "summary jurisdiction" over controversies

involving property in the actual or constructive possession of the court, but did not have jurisdiction over "plenary" matters, such as those involving property in the possession of a third person, except by consent. See generally 2A *Collier on Bankruptcy* para. 38.09[2], at 1428-1435 (14th ed. 1978).

The Bankruptcy Reform Act eliminates the referee system and establishes "in each judicial district, as an adjunct to the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district." 28 U.S.C. (Supp. III) 151. The Act also eliminates the distinction between summary and plenary jurisdiction, giving the new bankruptcy courts jurisdiction over "all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. (Supp. III) 1471(b). Under the Bankruptcy Reform Act decisions of the bankruptcy courts are appealable to three-judge panels comprised of bankruptcy judges, 28 U.S.C. (Supp. III) 160, 1482, or to the district court if no such appellate panel has been established, 28 U.S.C. (Supp. III) 1334. A second appeal may then be taken to the court of appeals. 28 U.S.C. (Supp. III) 1293(a). If the parties agree, a direct appeal to the court of appeals may be taken from a final judgment of the bankruptcy court. 28 U.S.C. (Supp. III) 1293(b).

Under Section 402(b) of the Act, 92 Stat. 2682, the provisions relating to the new bankruptcy courts do not formally become effective until April 1, 1984. During the transition period, the pre-1978 courts of bankruptcy remain in existence, Section 404(a), 92 Stat. 2683, with the existing bankruptcy referees serving as bankruptcy judges, Section 404(b), 92 Stat. 2683.[1] The transition bankruptcy courts are

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[1] When the Bankruptcy Reform Act becomes fully effective, judges of the new bankruptcy courts will be appointed by the President to 14-year terms, subject to removal for incompetence, misconduct or disability. 28 U.S.C. (Supp. III) 152, 153.

invested with the same jurisdiction given to the new bankruptcy courts, Section 405(b), 92 Stat. 2685, and are subject to essentially the same forms of appellate review. Section 405(c), 92 Stat. 2685.

2. Following the enactment of the Bankruptcy Reform Act, four debtors of cross-appellant instituted bankruptcy proceedings in the bankruptcy court for the District of Kansas. Relying on 11 U.S.C. (Supp. III) 522(f)(2), a new provision of the Act, the debtors petitioned the bankruptcy court to avoid certain nonpossessory, nonpurchase-money security interests that cross-appellant previously had acquired in the debtors' exempt personal and household property. Cross-appellant opposed the debtors' petitions on the ground that it would be unconstitutional to apply Section 522(f)(2) to avoid liens that had been acquired prior to the enactment of that section. Pursuant to 28 U.S.C. 2403(a), the United States intervened to defend the constitutionality of the statute. The bankruptcy court consolidated proceedings on the debtors' applications since they involved the same question of law. Noting that application of Section 522(f)(2) to pre-existing liens raised constitutional problems, the bankruptcy court dismissed the debtors' petitions and ruled that Section 552(f)(2) should be applied only to liens created after enactment of the Bankruptcy Reform Act. *Schulte* v. *Beneficial Finance of Kansas, Inc.*, 8 Bankr. Rep. 12 (D. Kan. 1980).

With the consent of all parties, the United States took a direct appeal to the court of appeals. See Section 405(c)(1)(B), 92 Stat. 2685; 28 U.S.C. (Supp. III) 1293(b). The court of appeals consolidated this appeal with five cases appealed from the bankruptcy court for the District of Colorado that also involved the constitutionality of Section 522(f)(2) as applied to preenactment liens and in which the debtors' petitions had also been dismissed. Relying on this Court's decision in *Louisville Joint Stock Land Bank* v.

Radford, 295 U.S. 555 (1935), the court of appeals held that Section 522(f)(2), as applied to security interests created prior to its enactment, violated the Fifth Amendment and affirmed the bankruptcy courts' dismissal of the debtors' petitions. *Rodrock* v. *Security Industrial Bank*, 642 F. 2d 1193 (10th Cir. 1981).

The United States has appealed from the judgment of the court of appeals pursuant to 28 U.S.C. 1252. Its jurisdictional statement was timely docketed on July 29, 1981, and presents the question: "Whether Section 522(f)(2) of the Bankruptcy Code, 11 U.S.C. (Supp. III) 522(f)(2), as applied to certain nonpossessory, nonpurchase-money security interests acquired before its enactment, violates the Fifth Amendment." *United States* v. *Security Industrial Bank*, No. 81-184. Cross-appellant docketed this cross-appeal on September 18, 1981, presenting the question whether the Bankruptcy Reform Act establishes the new bankruptcy courts in violation of Article III of the Constitution.

ARGUMENT

1. There is no basis for jurisdiction in this Court of this cross-appeal. Cross-appellant invokes (J.S. 3) Rule 12.4 of the Rules of this Court, but that rule only establishes procedures for taking a cross-appeal. It could not, and does not, provide a basis for jurisdiction. 28 U.S.C. 2071.

The only conceivable basis for appellate jurisdiction in this case is 28 U.S.C. 1252. Section 1252 allows a direct appeal to this Court from a decision holding an Act of Congress unconstitutional in any civil action to which the federal government is a party. The second paragraph of that section provides that when one party takes a direct appeal to the Supreme Court, as the United States did here, all other *appeals* in the case must be taken to the Supreme Court. This provision does not create any right of appeal; it merely avoids piecemeal litigation by specifying the court to

which a party may take an appeal. See R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978). Thus, a party must have a right to appeal before it can take that appeal to this Court. Because a party ordinarily has a right to appeal to the court of appeals from any adverse district court ruling embodied in a final decision (see 28 U.S.C. 1291), when a direct appeal is taken to this Court from a *district court* order holding a federal statute unconstitutional, the appellee may file a cross-appeal to this Court on another issue in the case. Here, however, the United States appealed from a judgment of a *court of appeals* holding a federal statute unconstitutional. See *Parker* v. *Levy*, 417 U.S. 733, 742-743 n.10 (1974). Cross-appellant had no right to appeal to this Court from an adverse ruling of the court of appeals; it could seek review only by writ of certiorari. The fact that the United States has taken an appeal under 28 U.S.C. 1252 from a judgment holding a federal statute unconstitutional does not create a right of appeal on other issues where none existed before.[2] Accordingly, there is no jurisdictional basis for the instant cross-appeal.

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[2]In enacting the second paragraph of 28 U.S.C. 1252, Congress obviously was concerned with the situation where one party appeals as of right to this Court from a district court order holding a federal statute unconstitutional, and the other party also wishes to challenge rulings of the district court on appeal. If the latter issues were to be appealed to the court of appeals pursuant to 28 U.S.C. 1291, then a single case would proceed simultaneously in two separate courts. If, on the other hand, the latter issues could not be appealed at all, then a party would have been deprived of its right to appeal. The solution was to allow the party not challenging the holding of unconstitutionality to pursue its appeal in the Supreme Court as well.

This dilemma does not arise when one party takes an appeal to this Court from the judgment of the court of appeals. The other party already has received an appellate ruling on the issues decided adversely to it, and in the usual situation it would have had no right to appeal that ruling to this Court. Appellate review would have been available only

Treating the cross-appeal as a petition for certiorari (see 28 U.S.C. 2103), the petition must be denied. The judgment of the court of appeals was entered on March 2, 1981. The jurisdictional statement was filed 200 days later, on September 18, 1981. Thus, it fails to comply with the time limitations of 28 U.S.C. 2101(c), which are jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).[3] Rule 19.5 of the Rules of this Court does provide that a respondent may file a cross-petition for certiorari within 30 days of receipt of the petition, but the Rules make no provision for the filing of a cross-petition in response to the docketing of an appeal.

2. Even assuming that the Court has jurisdiction to grant certiorari here, the petition should be denied. The question presented by cross-appellant, which was not briefed or decided in either court below, does not warrant review in this case.

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by writ of certiorari under 28 U.S.C. 1254(1). Congress could not have intended to transfer this class of cases from the Court's discretionary docket to its mandatory docket simply because the opposing party was authorized to take an appeal.

Further evidence that the second paragraph of 28 U.S.C. 1252 was not intended to benefit parties such as cross-appellant is supplied by the second sentence of that paragraph, which provides that "[a]ll appeals or cross appeals taken to other courts prior to such notice [of appeal to the Supreme Court] shall be treated as taken directly to the Supreme Court." This language clearly shows that Congress focused only on direct appeals to the Supreme Court from a district court. (Indeed, it was not until 1974 that this Court construed Section 1252 to allow appeal from a court of appeals.) Hence, it is most reasonable to interpret the word "appeal" in the second paragraph of Section 1252 to include only appeals as of right.

[3]Cross-appellant did not seek an extension of time to petition for certiorari, but even if it had obtained the maximum permissible extension, the time to petition for certiorari would have expired on July 30, 1981.

Cross-appellant points out (J.S. 2, 13-14) that one district court has ruled that the Bankruptcy Reform Act's extension of the jurisdiction of the bankruptcy courts violates Article III. *Marathon Pipeline Co.* v. *Northern Pipeline Construction Co.*, 12 Bankr. Rep. 946 (D. Minn. 1981), probable jurisdiction noted, Nos. 81-150 and 81-546 (Nov. 9, 1981). This case, however, involves a traditional exercise of "summary" bankruptcy jurisdiction by a bankruptcy court of the sort exercised innumerable times prior to the enactment of the Bankruptcy Reform Act. See, *e.g.*, *Weidhorn* v. *Levy*, 253 U.S. 268, 271-272 (1920). And under the transition provisions of the Bankruptcy Reform Act, the decision of the bankruptcy court was subject to appeal to the district court just as it was under the pre-1978 system. See Section 405(c)(1)(C), 92 Stat. 2685. Thus, this case does not appear to raise any Article III objections that could not have been made to a decision of a bankruptcy referee under the pre-1978 system, although that system existed for decades without constitutional challenge. See, *e.g.*, *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U.S. 426 (1924); *Weidhorn* v. *Levy, supra; White* v. *Schloerb*, 178 U.S. 542 (1900). In any event, to the extent that this case does present an Article III question, there is no reason why that question cannot be resolved in *Marathon*, in which this Court has already noted probable jurisdiction.

3. Contrary to cross-appellant's contention (J.S. 11), the fact that the question presented concerns the jurisdiction of the bankruptcy court does not require this Court to consider the question on its own motion. In *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), this Court considered an Article III challenge raised for the first time in a petition for certiorari because it considered the alleged defect as "a limitation on this Court's appellate jurisdiction." 370 U.S. at 535 (opinion of Harlan, J.). See *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737 (1976). The Court's

jurisdiction of the government's appeal under 28 U.S.C. 1252 in this case, however, is not affected by the Article III contention. Because the Court's jurisdiction under 28 U.S.C. 1252 is designed to resolve doubts about the constitutionality of federal statutes, the Court's jurisdiction does not depend on the jurisdiction of the court below. See *Williams* v. *Zbaraz*, 448 U.S. 358, 367-368 (1980); *McLucas* v. *DeChamplain*, 421 U.S. 21, 30-32 (1975). In any event, cross-appellant's challenge is directed only at the jurisdiction of the bankruptcy court, because the court of appeals manifestly is an Article III court. Therefore, the judgment appealed from was rendered in full compliance with the Constitution, and it is not tainted in any way by the alleged Article III defect in the bankruptcy court.[4]

CONCLUSION

The cross-appeal should be dismissed for lack of jurisdiction. Treating the jurisdictional statement as a petition for certiorari, the petition should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1981

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[4]This situation stands in sharp contrast to *Glidden*, where the two petitioners claimed that they had been denied a right to a hearing before an Article III tribunal. In one case, the judge whose authority was questioned presided over the petitioner's trial; in the other case, the judge was a member of the panel of the court of appeals that affirmed a judgment against the petitioner. See 370 U.S. at 532 (opinion of Harlan, J.).

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Appellant's Reply Brief

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No. 81-583

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BENEFICIAL FINANCE OF KANSAS, INC., *Cross-Appellant,*

v.

UNITED STATES OF AMERICA, *et al.*

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

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v.

UNITED STATES OF AMERICA, *et al.*

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Beneficial Finance of Kansas, Inc. ("Beneficial") respectfully submits the following Memorandum in Opposition to the Solicitor General's Motion to Dismiss for lack of jurisdiction, pursuant to Rule 16.5 of this Court.

ARGUMENT

1. The government's argument that there is no jurisdictional basis for this cross-appeal rests upon the proposition that 28 U.S.C. §1252 does not mean what it says. Section 1252 states that "any party may appeal to the Supreme Court" from an interlocutory or final order of "any court of the United States" holding an Act of Congress unconstitutional where the government is a party. Beneficial and the United States were parties to the Tenth Circuit's decision holding unconstitutional §522(f) of the Bankruptcy Reform Act of 1978. 11 U.S.C. §522(f). Since the relief Beneficial seeks is different and broader than that afforded by the judgment below — i.e., it seeks an order dismissing the entire bankruptcy proceeding — an appeal (or cross-appeal) lies, *Federal Energy Commission* v. *Algonquin*

SNG, Inc., 495 U.S. 548, 560 n.11 (1976). See, Stern and Grossman, *Supreme Court Practice*, 26.34 at 477-485 (5th ed. 1978). This cross-appeal was perfected in the manner expressly allowed by Rule 12.4 of this Court. The government's assertion of a lack of appellate jurisdiction here is novel, confused, without citation of authority, and indeed conflicts with the authorities. [1]

2. The government's further argument that this Court does not consider on its own motion jurisdictional defects in lower court proceedings, except for those limiting this Court's own appellate jurisdiction, misreads the cases and indeed would overturn clear contrary authority dating back to earliest constitutional times. In *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 607 n.6, 98 S.Ct. 2002 (1978), for example, this Court stated that "Although the question of the District Court's subject matter jurisdiction was not raised in this Court or apparently in either court below, *we have an obligation to consider the question sua sponte*." (Emphasis added). And in *Mansfield, Coldwater & Lake Michigan R. Co.* v. *Swan*, 111 U.S. 379, 382, 4 S.Ct. 510 (1884) (district court's lack of diversity jurisdiction requires dismissal although not raised in court of appeals), this Court stated that

> On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this court, and *then of the court from which the record comes. This question the court is bound to ask and answer for itself*, even when not otherwise suggested, and without respect to the relation of the parties to it. This rule was adopted in *Capron* v. *Van Noorden*, 2 Cranch, 126, decided in 1804. . . . (Emphasis added).

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[1] Indeed, §1252 itself states that "A party who has received notice of appeal under this section shall take any subsequent appeal or cross-appeal to the Supreme Court," and *Parker* v. *Levy*, 417 U.S. 733, 742-743 n.10 (1974), holds that appeals from courts of appeals fall within that section. See also *United States* v. *Clark*, ____ U.S. ____, 100 S.Ct. 895, 899 n. 2 (1980).

The Solicitor General's attempted narrowing construction of *Glidden* v. *Zdanok*, 370 U.S. 530 at 535-7 (1962), also is erroneous. As here, in *Glidden* the alleged jurisdictional defect was in the court of first impression, and in no way limited or impaired "this Court's appellate jurisdiction."[2] The cross-appeal clearly lies.

3. Beneficial has also sought to present to this Court the issue of the unconstitutionality of the bankruptcy court under Article III by filing a Motion to Enlarge the Question Presented in No. 81-184, which the Solicitor General has not opposed. This Motion follows in recognition of the fact that

> "an appeal under §1252 brings before us not only the constitutional question, but the whole case, e.g., United States v. Raines, *supra*, 362 U.S., at 27 n.7, 80 S.Ct. at 526; see 9 J. Moore, Federal Practice ¶ 110.03[5], p. 96 (2d ed. 1973), *including threshold issues of subject-matter jurisdiction*, United States v. American Friends Service Committee, 419 U.S. 7, 12 n.7, 95 S.Ct. 13, 16, 42 L.Ed.2d 7 (1974), . . ." *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32, 95 S.Ct. 1365, 1372 (1975). (Emphasis added).

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[2] The Solicitor General quotes a statement of Justice Harlan as supporting the Solicitor General's statement that this Court considered the Article III challenge in that case "because it considered the alleged defect as 'a limitation on this Court's appellate jurisdiction' " (Motion to Dismiss, p. 8). This is a misreading of Justice Harlan's opinion. The issue in *Glidden*, decided by the Court, was whether the judgment of the Court of Appeals was vitiated because two members of the panel were judges of the Court of Claims and the Court of Customs and Patent Appeals. The Court held, in Justice Harlan's words, that it was "open to these petitioners to challenge the constitutional authority of the judges below" despite the fact that the question had not been raised below. It held that the challenged judges were Article III judges and, therefore, qualified to hear and decide the case. Justice Harlan's quoted remark was incidental to a general discussion of some of the circumstances in which technical objections to a judge's authority, belatedly asserted, might prevail. Justice Harlan's opinion was joined by Justices Brennan and Stewart.

One way or the other, resolution of the jurisdictional issue presented by Beneficial is a condition precedent to resolution of the merits of the government's appeal in No. 81-184.

Beneficial has also moved to coordinate or consolidate this case with *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.* and *United States* v. *Marathon Pipeline Co.*, Nos. 81-150 and 81-546, *probable jurisdiction noted*, 60 L.W. 3375 (Nov. 9, 1981). *Northern Pipeline* raises the question whether the non-Article III bankruptcy courts can constitutionally exercise the power given to them by the Bankruptcy Reform Act, to hear non-bankruptcy cases which are "related to" a bankruptcy proceeding. This case raises the related question whether the new bankruptcy courts have power to hear even ordinary bankruptcy cases without violating Article III. A decision in *Northern Pipeline* would not necessarily resolve the question presented here. Granting the Motion to Coordinate or Consolidate will allow simultaneous consideration and resolution of all the Article III issues inherent in the new bankruptcy courts created by the Bankruptcy Reform Act of 1978.

4. The Solicitor General's argument on the merits (Motion to Dismiss, p. 8) that the Bankruptcy Reform Act of 1978 did not alter existing procedures is fallacious and utterly ignores the fact that under the old Bankruptcy Act a United States district judge had general and pervasive power over the "bankruptcy judges", powers which the new 1978 Act completely destroys. Under the new Act, untenured referees or "judges" have full judical powers, subject only to appeal.[3] Contrary to the Solicitor General's suggestion (Motion to Dismiss, p. 9), Article III is not fulfilled by the provisions relating to appeal.

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[3] The government states that the decision of the bankruptcy court in the instant case was subject to appeal to the district court (Motion to Dismiss, p. 8) because no appellate panel of bankruptcy judges had been established in the Tenth Circuit. Had such a panel been established, as provided by the Bankruptcy Reform Act, three untenured bankruptcy judges and not an Article III district judge would have heard such an appeal. No such appeal was taken.

See, e.g., *United States* v. *Raddatz*, 447 U.S. 667(1980); *Glidden Co.* v. *Zdanok, supra.*

CONCLUSION

The Motion to Dismiss should be denied. Probable jurisdiction should be noted on the cross-appeal.

Respectfully submitted,

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